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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

In re

MICHAEL HAMILTON,

on Habeas Corpus.

B168006

(Los Angeles County Super. Ct.
No. BH002202)

APPEAL from an order of the Superior Court of Los Angeles County.

David S. Wesley, Judge. Reversed.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Frances T. Grunder, Senior Assistant Attorney General, Julie L. Garland and Jane Catherine Malich, Deputy Attorneys General, for Appellant.

Gary M. Diamond, under appointment by the Court of Appeal, for Respondent.

This is an appeal from an order of the superior court granting a petition for writ of habeas corpus. The appeal has been filed by the Attorney General on behalf of Governor Gray Davis, who reversed an order of the Board of Prison Terms granting parole to prisoner Michael Hamilton, and on behalf of Teresa Schwartz, the warden at the California Medical Facility in Vacaville, California where Hamilton is incarcerated. On May 28, 2003, the superior court granted Hamilton's petition for writ of habeas corpus and ordered the Board's decision granting parole reinstated. The order granting the habeas corpus petition is appealable under Penal Code section 1506. The Attorney General contends the superior court erred (1) in its application of the "some evidence" standard of review, and (2) in its consideration of materials that had not been before the Governor. We conclude the superior court substituted its judgment for that of the Governor. We reverse.

FACTS AND PROCEDURAL HISTORY

Underlying Facts of the Commitment Offense

In 1980, Hamilton was convicted of first degree felony murder and robbery, with a firearm use enhancement. He was sentenced to 25 years to life in prison. In a habeas corpus proceeding, his conviction was thereafter reduced to second degree murder pursuant to *People v. Dillon* (1983) 34 Cal.3d 441 [life sentence for felony murder constituted cruel and unusual punishment under circumstances of the case], and he was sentenced to 15 years to life in state prison. Defendant received no additional time for the firearm use enhancement or the robbery.

Hamilton (then age 18) and two juvenile companions, Matthew A. and Jerry B. (both age 17), were bored and cruising around town in Hamilton's car. They decided to commit a robbery for the "thrill." At the time, Hamilton was employed, lived with his brother, and had \$70 in his possession. The three youths obtained a shotgun and a pistol

from Matthew A.'s house, then went to a nearby restaurant. Before Hamilton entered the restaurant, Matthew A. loaded the pistol for Hamilton; Hamilton cocked the pistol and placed it in his waistband. Hamilton brandished the pistol as he entered the restaurant and ordered everyone to lie on the floor. He then jumped the counter and ordered the cook at gunpoint to open the cash register. At that time, the victim, Ricardo Pena, a customer, entered the restaurant unaware of the robbery in progress. Pena was under the control of Matthew A., who was armed with the shotgun. Hamilton jumped back over the counter. Hamilton put the gun to the back of the victim's head as he ordered the victim to lie on the floor. The victim was compliant and did not struggle. Hamilton shot the victim in the back of the head, fatally wounding the victim, the stepfather and sole support of a family of 10 children. After the shooting, Hamilton jumped back over the counter and robbed the cook at gunpoint of \$153. Hamilton fled to Missouri. After his accomplices had been arrested and had implicated him, Hamilton surrendered to law enforcement authorities.

Parole Hearing

Hamilton was denied parole nine times in the 1990s. At the tenth hearing, on November 14, 2001, the Board found Hamilton suitable for parole. The Board based its decision on the following factors: Hamilton had no juvenile record of assaulting others and his only juvenile record was for shoplifting; he had demonstrated a stable social history over the course of his confinement, exhibited by "reasonably stable relationships with others"; while in prison, he had "enhanced his ability to function within the law upon release through participation in educational programs, self-help and therapy programs, vocational programs, and institutional job assignments"; because of "maturation, growth, and greater understanding of his crime, he ha[d] a reduced probability of recidivism"; he had realistic parole plans, including a job offer and family

support; he “ha[d] for the past 16 years maintained positive institutional behavior which indicate[d] significant improvement in self[-]control”; and he showed signs of remorse.

Governor’s Decision

On April 12, 2002, the Governor reversed the Board’s decision. In arriving at this decision, the Governor expressly considered the same factors considered by the Board. The Governor’s evaluation of the commitment offense was as follows: “Mr. Hamilton planned and committed a serious crime that resulted in the loss of human life. After obtaining the guns from Mr. [A].’s house, Mr. Hamilton cocked one of the guns and put it in his waistband before entering the restaurant. [¶] After shooting Mr. Pena in the head, Mr. Hamilton proceeded to take money from the cash register. His actions demonstrate a callous disregard for human life and suffering. Further, the motive for this offense is inexplicable. According to Mr. Hamilton, Mr. [B.] proposed the armed robbery out of a desire for ‘thrills.’ This may indeed have been the case because Mr. Hamilton already had approximately \$70 in his pocket before the robbery.” The Governor concluded Hamilton had committed a grave offense.

The Governor noted that Hamilton had “a criminal history as a juvenile” and a “history of substance use beginning at age 12, when he started using marijuana.”

The Governor further noted Hamilton’s serious disciplinary record while in prison. While Hamilton was housed at San Quentin from 1981 to 1985, he joined the Aryan Brotherhood (a White supremacy gang) and accumulated 19 serious disciplinary reports, “including four for possession of alcohol, two for throwing an unknown liquid on staff, two for disobeying orders, two for drug possession and one each for possession of contraband, being involved in a physical altercation, theft, possession of a stabbing instrument, stabbing assault on an inmate, force and violence, threatening staff, improper work activity, and dangerous conduct. He also has 7 minor disciplinary reports.” The

Governor referenced a 1997 disciplinary report for possession of contraband, but there is no evidence of this disciplinary report in the record.¹

The Governor disagreed with the Board's conclusion that Hamilton had expressed remorse for the crime. In the Governor's view, Hamilton "sometimes acknowledges his responsibility for his crime" and "rationalizes it by blaming it on his family difficulties and alcohol." The Governor noted that others who had faced such adversity, i.e., family difficulties, had made better choices. "Parole will certainly present adverse situations from time to time. He must genuinely accept the fact that adversity cannot justify lawlessness."

The Governor noted that both the Los Angeles County District Attorney's Office and the Los Angeles County Sheriff's Department opposed parole.

Finally, the Governor concluded that because Hamilton had committed "a grave offense" and had "attacked other prisoners and correctional officers after incarceration," he posed a danger to public safety if released at this time.

Habeas Corpus Petition

On November 18, 2002, Hamilton filed a habeas corpus petition in the superior court, challenging the Governor's decision. Hamilton claimed the Governor's decision violated his due process rights because, among other things, it was based solely on evidence perceived to be negative, without consideration of the "far greater body of evidence" that qualified Hamilton for parole. Hamilton also claimed that the Governor's alleged "review process" is a sham because Board staff prepares the Governor's decisions utilizing "a list of all conceivable negative facts and non-'facts' concerning the

¹ The Attorney General refers to a 1997 disciplinary chronology that is not part of the record on appeal.

commitment offense,” then the Governor merely rubber stamps the decision without even reviewing the case.

The superior court issued an order to show cause. The return and traverse were filed. The superior court granted the petition in an order filed May 28, 2003. The superior court ordered the Governor to vacate his decision reversing the Board’s parole decision and ordered the Board’s parole decision reinstated. The superior court was of the view the Governor had concluded the killing was intentional. The superior court disagreed with this conclusion, noting the trial court in postconviction proceedings had found the shooting accidental. The superior court believed this finding to be binding and conclusive on the Governor. However, there was no evidence that the reporter’s transcript of this proceeding had been part of the materials reviewed by the Governor. The superior court further noted that the Governor had failed to mention Hamilton’s accomplishments and improved behavior since leaving San Quentin in 1985, and rejected the Governor’s conclusion that Hamilton had not taken responsibility for the crime.

DISCUSSION

“Article V, section 8(b) [of the California Constitution] provides that ‘the Governor *may* review the [parole] decision [of the Board of Prison Terms] *subject to procedures provided by statute.*’ (Italics added.) This language confers upon a Governor the discretion whether to review a parole decision, but if such discretion is exercised, he or she is constrained by . . . statute. Article V, section 8(b), further states: ‘The Governor may only affirm, modify, or reverse the decision of the parole authority *on the basis of the same factors which the parole authority is required to consider.*’ (Italics added.) Thus the Governor’s decision must be based upon the same factors that restrict the Board in rendering its parole decision.” (*In re Rosenkrantz* (2002) 29 Cal.4th 616, 660.) However, the Governor undertakes an independent, de novo review of the prisoner’s suitability for parole. (*Ibid.*)

In determining whether a prisoner sentenced to an indeterminate term is suitable for parole, the Board considers circumstances tending to show unsuitability and circumstances tending to show suitability. (*In re Rosenkrantz, supra*, 29 Cal.4th at pp. 653-654.) “[C]ircumstances tending to establish unsuitability for parole are that the prisoner (1) committed the offense in an especially heinous, atrocious, or cruel manner; (2) possesses a previous record of violence; (3) has an unstable social history; (4) previously has sexually assaulted another individual in a sadistic manner; (5) has a lengthy history of severe mental problems related to the offense; and (6) has engaged in serious misconduct while in prison.” (*Id.* at pp. 653-654, fn. omitted.) “Factors that support a finding that the prisoner committed the offense in an especially heinous, atrocious, or cruel manner include the following: (A) multiple victims were attacked, injured, or killed in the same or separate incidents; (B) the offense was carried out in a dispassionate and calculated manner, such as an execution-style murder; (C) the victim was abused, defiled, or mutilated during or after the offense; (D) the offense was carried out in a manner that demonstrates an exceptionally callous disregard for human suffering; and (E) the motive for the crime is inexplicable or very trivial in relation to the offense.” (*Id.* at p. 653, fn. 11.)

“[C]ircumstances tending to establish suitability for parole are that the prisoner: (1) does not possess a record of violent crime committed while a juvenile; (2) has a stable social history; (3) has shown signs of remorse; (4) committed the crime as the result of significant stress in his life, especially if the stress has built over a long period of time; (5) committed the criminal offense as a result of battered woman syndrome; (6) lacks any significant history of violent crime; (7) is of an age that reduces the probability of recidivism; (8) has made realistic plans for release or has developed marketable skills that can be put to use upon release; and (9) has engaged in institutional activities that indicate an enhanced ability to function within the law upon release.” (*In re Rosenkrantz, supra*, 29 Cal.4th at p. 654.)

The circumstances tending to establish unsuitability and suitability for parole “are set forth as general guidelines; the importance attached to any circumstance or combination of circumstances in a particular case is left to the judgment of the panel.” (*In re Rosenkrantz, supra*, 29 Cal.4th at p. 654.)

“The nature of the prisoner’s offense, alone, can constitute a sufficient basis for denying parole. . . . [¶] In some circumstances, a denial of parole based upon the nature of the offense alone might rise to the level of a due process violation—for example where no circumstances of the offense reasonably could be considered more aggravated or violent than the minimum necessary to sustain a conviction for that offense.” (*In re Rosenkrantz, supra*, 29 Cal.4th at pp. 682-683.)

“[T]he courts properly can review a Governor’s decisions whether to affirm, modify, or reverse parole decisions by the Board to determine whether they comply with due process of law, and . . . such review properly can include a determination of whether the factual basis of such a decision is supported by some evidence in the record that was before the Board.” (*In re Rosenkrantz, supra*, 29 Cal.4th at p. 667.) “Only a modicum of evidence is required. Resolution of any conflicts in the evidence and the weight to be given the evidence are matters within the authority of the Governor. As with the discretion exercised by the Board in making its decision, the precise manner in which the specified factors relevant to parole suitability are considered and balanced lies within the discretion of the Governor, but the decision must reflect an individualized consideration of the specified criteria and cannot be arbitrary or capricious. It is irrelevant that a court might determine that evidence in the record tending to establish suitability for parole far outweighs evidence demonstrating unsuitability for parole. As long as the Governor’s decision reflects due consideration of the specified factors as applied to the individual prisoner in accordance with applicable legal standards, the court’s review is limited to ascertaining whether there is some evidence in the record that supports the Governor’s decision.” (*Id.* at p. 677.) If there is some evidence in the record supporting the Governor’s finding, the circumstance that a fact finder determined differently does not

preclude the Governor from considering such evidence in deciding whether to reverse the decision of the Board. (*Id.* at pp. 678-679.) “[T]he applicable standard of review is extremely deferential to the Governor’s decision.” (*Id.* at p. 679.) The “some evidence” standard cannot be compared to the “substantial evidence” standard. (*Id.* at p. 665.)

In this case, the Governor reviewed the same materials reviewed by the Board and considered the same factors. The Governor determined to reverse the parole decision of the Board, based on a number of circumstances. First, the Governor determined Hamilton had committed a grave offense and had demonstrated a callous disregard for human life and suffering. This determination is supported by some evidence in the record. Hamilton, the only adult in the group, decided with two juveniles to commit an armed robbery for the thrill of it. The three youths took two guns from one of their homes and went to a restaurant in Hamilton’s car. Hamilton took a loaded pistol, cocked it, and placed it in his waistband. It was Hamilton who jumped over the counter and ordered the cook at gunpoint to open the register. It was Hamilton who jumped back over the counter and shot a compliant and unresisting customer in the back of the head. It was Hamilton who left his dying victim on the floor and jumped back over the counter to complete the robbery. It was Hamilton who fled out of state. These facts are undisputed. The inferences drawn from these facts by the Governor are reasonable. The Governor did not expressly infer that the shooting had been intentional, but rather indicated that the shooting had been committed as a result of a callous disregard for the life of the victim. Thus, the factors that the offense was carried out in a manner that demonstrated an exceptionally callous disregard for human suffering and the motive for the crime was inexplicable or very trivial are supported by some evidence, and these factors support a finding that Hamilton committed the offense in an especially heinous, atrocious, or cruel manner. Moreover, multiple victims were assaulted during the robbery, including the murder victim and the cook. Thus, certain circumstances of the offense involve particularly egregious acts beyond the minimum necessary to sustain a conviction for second degree murder.

Second, the Governor determined Hamilton had engaged in serious misconduct while in prison. This determination is also supported by some evidence. Hamilton joined in a White supremacy prison gang and suffered many discipline reports. These discipline reports ranged from the minor to the extremely serious and included assaults on staff, threats to staff, possession of weapons, fighting, the use of force and violence, assault with a stabbing instrument on an inmate, and dangerous conduct. The transcript of the Board hearing reveals that Hamilton was deprived of conduct credit for this misconduct. It is true that the discipline reports apparently ceased after 1985 and the Governor's indication that Hamilton received a disciplinary report in 1997 is not supported by the record. However, the courts are not permitted to reweigh the circumstance and attribute less weight to the circumstance than does the Governor. Our review is only for some evidence to support the determination; some evidence unquestionably exists that Hamilton engaged in serious misconduct while in prison.

The Governor also noted that Hamilton had a criminal history as a juvenile and had a history of substance abuse from age 12. The Governor further noted that the Los Angeles District Attorney's Office and the Los Angeles County Sheriff's Department both opposed release due to the aggravated nature of the offense. The Governor properly relied on these circumstances, since the denominated circumstances are not exclusive, but merely guidelines. Finally, the Governor was not convinced that Hamilton was sufficiently remorseful or took sufficient responsibility for the offense. These latter two determinations were based on the history of Hamilton's explanations for the offense and his statements at the last parole hearing in which he "explained" his conduct as resulting from his family difficulties and his substance abuse.

We conclude some evidence supports the Governor's determination that the circumstances of Hamilton's offenses and his serious misconduct while in prison tend to establish that Hamilton is not suitable for parole. Although the Governor's decision does not mention some of the circumstances that the Board found tended to establish Hamilton's suitability for parole, nothing in the Governor's decision indicates that he

failed to consider all of the relevant factors as they applied to Hamilton's individual case. That the Board, the superior court, or even this court might have arrived at a different determination is not relevant.

DISPOSITION

The order of the superior court granting the petition for writ of habeas corpus is reversed. The superior court is directed to enter an order denying the petition for writ of habeas corpus.

NOT TO BE PUBLISHED.

GRIGNON, J.

I concur:

TURNER, P. J.

MOSK, J., Concurring.

I concur because of the language in *In re Rosenkrantz* (2002) 29 Cal.4th 616, 676-677 that the Governor's decision to deny parole will not be disturbed if supported by "some evidence" or a "modicum of evidence."

Some of the Governor's statements arguably were incomplete. Petitioner had no criminal record other than a juvenile conviction for shoplifting a pair of boots. Petitioner did take full responsibility for his crime. And the record shows no prison discipline in 1997 and that he had been discipline-free since 1985. His conviction was reduced to second degree murder, and a trial court found the killing to be "accidental."

The Governor had evidence from which he concluded that the crime was such as to justify a denial of parole. Notwithstanding that the "some evidence" test is not new, that test is difficult to apply.¹ (See *In re Smith* (2003) 109 Cal.App.4th 489, 504-506 [holding there not to be "some evidence" while discounting the statement of a codefendant that petitioner was the shooter].) The Supreme Court seems to suggest that it means "any evidence." (*In re Rosenkrantz, supra*, 29 Cal.4th at p. 675.)

The "some evidence" test is, of course, "not a substitute for other established due process requirements." (*In re Ramirez*, (2001) 94 Cal.App.4th 549, 563-564.) Thus as said in *Ramirez*, the "some evidence" test cannot be a shield for arbitrary action (a coin flip) or a blanket policy. (*Ibid.*) Had the Governor's reasons included statements of material facts that were erroneous or not based on some evidence in the record, it appears that his action would constitute a denial of due process, and would, at least, require him

¹ "Some evidence" is a term used in other contexts. (*Superintendent v. Hill* (1985) 472 U.S. 445, 457 [prison disciplinary proceeding]; *In re Powell* (1988) 45 Cal.3d 894, 904 [parol rescission]; *Lorenson v. Superior Court* (1950) 35 Cal.2d 49, 55 [grand jury indictment]; *In re Farley* (2003) 109 Cal.App.4th 1356, 1361 [classification of prisoner]; *People v. Superior Court (Baez)* (2000) 79 Cal.App.4th 1177, 1190 [for discovery in connection with discriminatory or selective prosecution].)

to reconsider absent the unsupported factual conclusions. The court in *Rosenkrantz*, *supra*, 29 Cal.4th at 677 noted that even though there was no evidence to support some of the Governor's conclusions, the Governor indicated he "would have reached the same conclusion regarding parole suitability even without the determination [that was not supported by evidence]." The court stated that in that case "the decision of the Governor made clear that he independently found that petitioner poses a risk of danger based upon the nature of the offense and petitioner's conduct before he surrendered." (*Id.* at p. 682; see also *In re Capistran* (2003) 107 Cal.App.4th 1299.)

Here, the Governor came to some factual conclusions that may have been literally true, although some of the underlying facts were not accurate. Any errors or omissions do not appear to have been material, and there does not appear to be sufficient evidence of a due process violation. Until there is further clarification of the "some evidence" test and under what circumstances factually erroneous or unsupported conclusions by the Governor constitute a denial of due process, trial and appellate courts will continue to struggle with the issue of judicial review of the Governor's authority to review parole decisions of the Board of Prison Terms.

MOSK, J.